FILE COPY

FILED
JUL 10 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

~~OCTOBER TERM 1929—No. 84~~

OCTOBER TERM 1929—No. 122

FEDERAL RADIO COMMISSION,

Petitioner,

against

GENERAL ELECTRIC COMPANY AND PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN BEHALF OF GENERAL ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK J. HOGAN,
WILLIAM H. DONOVAN,
JOHN W. GUIDER,
Counsel for General Electric Company.

CHARLES E. HUGHES,
STEPHEN H. PHILBIN,
ALLEN S. HUBBARD,
JOHN FLETCHER CASKEY,
Of Counsel.

July 10, 1929.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

INDEX

PAGE

FIRST: THE DECISION OF THE COURT OF APPEALS HAVING BEEN RENDERED BY AN ADMINISTRATIVE TRIBUNAL UNDER THE RADIO ACT IS NOT SUBJECT TO REVIEW BY THIS COURT 4

SECOND: THE QUESTIONS SOUGHT TO BE REVIEWED ARE UNIMPORTANT QUESTIONS OF PROCEDURE WHICH WERE CORRECTLY DETERMINED BY THE COURT OF APPEALS 8

(1) The time for the filing of the appeal..... 8

(2) The submission of additional evidence..... 9

(3) The decision denying a renewal of the license was appealable 10

(4) The appeal was not moot at the time of the decision 10

(5) The appeal by the State of New York..... 11

(6) No regulations or orders of the Commission were held invalid 12

THIRD: THE DECISION OF THE COURT OF APPEALS REVERSING THE ORDER OF THE COMMISSION WAS CORRECT UPON THE FACTS..... 15

TABLE OF CASES

	PAGE
Eastman Kodak Co. *v.* Federal Trade Commission, 274 U. S. 619	4
Ex parte Bakelite, Oct. term, 1928, No. 17; 73 L. ed. 490	7
Keller *v.* Potomac Electric Power Co., 261 U. S. 428	4
Ma-King Products Co. *v.* Blair, 271 U. S. 479	4
Postum Cereal Co. *v.* California Fig Nut Co., 272 U. S. 693	4
Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498	11

TABLE OF STATUTES

Federal Trade Commission Act (Act of Sept. 26, 1914, c. 311, 38 Stat. 717)	4, 5
National Prohibition Act (Act of Oct. 28, 1919, c. 85, 41 Stat. 305)	4
Radio Act, Sec. 16 (Act of Feb. 23, 1927, c. 169, 44 Stat. 1162)	4

TEXT BOOKS

Davis, *The Law of Radio Communication*	7

IN THE

Supreme Court of the United States.

OCTOBER TERM 1928—No. 944

OCTOBER TERM 1929—No. 122

FEDERAL RADIO COMMISSION,
Petitioner,

AGAINST

GENERAL ELECTRIC COMPANY and PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN BEHALF OF GENERAL ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks to review an administrative decision of the Court of Appeals of the District of Columbia, reversing a decision of the Federal Radio Commission refusing the renewal of a station license to General Electric Company for the operation of its station at Schenectady, New York, known by its call letters WGY. The facts upon which the Court of Appeals based its conclusion that station WGY was entitled to a renewal of its license clearly required that conclusion.

On January 14, 1928, General Electric Company applied to the Radio Commission for a renewal of the then existing license to station WGY granted by the Radio Commission on November 1, 1927 (R. 88, 89). This license was for exclusive full time operation on a frequency of 790 kilocycles

with power of 50 kilowatts (R. 95). Station WGY had been operating on a frequency of 790 kilocycles since May 21, 1923, as appears from its application (R. 94). The application showed the character of the station, that it was being operated during the evening hours substantially every day from 6 o'clock to 11 or 12 P. M. or 1 A. M. and on Sunday to 10:45 P. M. (R. 91), the average time being until after 11:30 P. M. It showed that the population within one hundred miles of Schenectady exceeded 1,400,000, that this community, including Albany, Troy, Amsterdam, Utica and many villages and rural sections, depended almost entirely on WGY for radio programs and that other stations were not well received in that vicinity (R. 92), that WGY had the resources of the research laboratories of General Electric Company, and that it was used as a development station for testing new inventions and ideas. The application also listed a number of major improvements that had been developed by General Electric Company in connection with WGY (R. 92). None of these facts was disputed by the Commission. It is entirely clear that WGY is one of the great stations of the country, that it is a pioneer in the development of the radio art and that it furnishes a service to important communities, which cannot be rendered by other stations.

The Radio Commission acted upon this application on October 12, 1928, ordering that a license effective November 11, 1928 be issued to WGY for operations on a frequency of 790 kilocycles, but denying it the right to operate full time as it had been operating (R. 130, 138). Construed in accordance with the general regulations of the Commission, the new license required station WGY to close down after sunset on the Pacific coast (General Orders Nos. 41, 42 and 48; R. 109, 110, 111), or at average times varying from 7:56 P. M. in the month of December to 10:32 P. M. in the month of June (R. 130). This serious curtailment of the right of WGY to continue its operations was tantamount to a prohibition against its effective continuance.

General Electric Company appealed from this decision to the Court of Appeals of the District of Columbia. The

Commission made its return. Neither the Commission nor General Electric Company petitioned the Court of Appeals for leave to submit additional evidence. The Court of Appeals considered the facts contained in the record presented to it and held that the restrictions imposed by the Radio Commission were unreasonable and not in the public interest. It directed the Commission to issue a renewal of WGY's former license which had been refused by the Commission (R. 392).

The Radio Commission seeks to review this decision upon various highly technical procedural grounds.

We submit:

FIRST: The decision of the Court of Appeals, having been rendered as an administrative tribunal under the Radio Act, is not subject to review by this Court.

SECOND: The questions sought to be reviewed are unimportant questions of procedure which were correctly determined by the Court of Appeals.

THIRD: The decision of the Court of Appeals reversing the order of the Commission was correct upon the facts.

FIRST: The decision of the Court of Appeals, having been rendered as an administrative tribunal under the Radio Act is not subject to review by this Court.

Section 16 of the Radio Act (Act of Feb. 23, 1927, c. 169, 44 Stat. 1162 [printed in the margin]) provides that upon an appeal from a decision of the Commission refusing the renewal of a license, the Court of Appeals may take additional evidence and authorizes the Court to "alter or revise the decision appealed from and enter such judgment as to it may seem just". There can be no doubt that this function is legislative or administrative in character, not judicial, and that the decision rendered is not reviewable by this Court. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693.

Upon the authority of *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, the Court of Appeals denied a stay of its mandate upon this application for a writ of certiorari (R. 394, 395).

The cases cited by petitioner (p. 27) *Ma-King Products Co.* v. *Blair*, 271 U. S. 479 and *Eastman Kodak Co.* v. *Federal Trade Commission*, 274 U. S. 619, dealing with the powers conferred upon the Federal Courts by the National Prohibition Act (Act of Oct. 28, 1919, c. 85, 41 Stat. 305) and by the Federal Trade Commission Act (Act of Sept. 26, 1914, c. 311, 38 Stat. 717), are inapposite. The National Prohibition Act authorizes a review of the decision of the Com-

"Sec. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the

missioner revoking or refusing an application for a permit by the Federal District Courts, in the following language:

> "The manufacturer may by appropriate proceeding in a court of equity have the action of the Commissioner reviewed and the Court may affirm, modify or reverse the finding of the Commissioner as the facts and law of the case may warrant, * * *" Sec. 5.

The Federal Trade Commission Act provides that the Circuit Court of Appeals should have "jurisdiction of the proceeding and of the question determined therein and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the Commission". The Court is given no power to make findings of fact, and the Act expressly provides: "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive". Sec. 5.

There is manifestly no similarity between the powers conferred upon the Court of Appeals of the District of Columbia over the Radio Commission and the powers vested in a District Court or in a Circuit Court of Appeals under the Prohibition Act and the Federal Trade Commission Act.

That it was the intention of Congress to make the review afforded by the Court of Appeals administrative is clearly reflected by its legislative history. Mr. White in charge of the passage of the bill in the House successfully opposed an amendment which would have conferred jurisdiction of appeals upon the several Federal Courts, upon the very ground

---

decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and

that the bill was providing an administrative review which the Committee did not believe could be conferred upon the District Courts. He said (Cong. Rec. 69th Cong., 2d Sess. Part 2, p. 5567):

> "Mr. Chairman, I want to say for myself and the members of the committee that we stand on the principle of law laid down in the case cited [Keller v. Potomac Electric Power Company]. We believe it is unconstitutional to attempt to impose on the Federal courts of the United States the administrative and legislative functions which are involved in this amendment. Then there are some practical objections. This paragraph was considered and comes before this House with the unanimous approval of the Committee on The Merchants Marine and Fisheries, except as to the question whether the appeal should be to the Court of Appeals or the Supreme Court of the District."

The present provisions in the act authorizing an appeal to the Federal District Court in cases of revocation of licenses, to which the petitioner herein seeks to attach importance, was inserted by the House conferees as a concession to the wishes of the Senate (Cong. Rec. 69th Cong., Rec. 2d. Sess., Part 3, p. 2563). It was intended to enable station owners, whose licenses were revoked by the Radio Commission, to litigate the propriety of the revocation near home, evidently without full appreciation of the constitutional differences between the power of Congress to confer administrative duties upon the Court of Appeals of the

---

given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal."

District of Columbia and its power to confer such duties upon the Federal District Courts. *See Ex parte Bakelite,* Oct. term, 1928, No. 17; 73 L. ed. 490.

Judge Davis in his book, *The Law of Radio Communication,* (pp. 75, 76) points out the administrative character of the review in the Court of Appeals of the District of Columbia which is afforded by the Radio Act:

> "Under Section 16 of the act, any person whose application is rejected may appeal to the Court of Appeals of the District of Columbia where he is entitled to a hearing and determination *de novo.* The provision follows that already in force for obtaining a review of certain decisions of the Commissioner of Patents and of the Public Utility Commission of the District of Columbia. While the result is undoubtedly to impose upon the court the performance of an administrative rather than a judicial function, the power of Congress to so provide has been upheld by the Supreme Court in cases arising under the previous statutes."

In the present case, the Court of Appeals was exercising its administrative function in ordering the Radio Commission to renew WGY's full time license, and that determination is not reviewable by this Court.

SECOND: The questions sought to be reviewed are unimportant questions of procedure which were correctly determined by the Court of Appeals.

(1) The time for the filing of the appeal.

The Commission contends that the Court of Appeals incorrectly decided when an appeal should be taken, and that the two appeals herein were untimely. That contention is unsound.

The resolution of the Commission of September 8, 1928, which first announced tentatively the terms of the license which the Commission proposed to grant provided (R. 28):

> "1. That said new allocation shall become *effective* at the hour of 3 o'clock A. M. Eastern Standard Time, November 11, 1928, * * *"

The resolution of October 12 granting the limited license provides (R. 34):

> "4. That each license or renewal license issued under the foregoing directions be so worded as *to take effect* on November 11th at the hour of 3 o'clock A. M. Eastern Standard Time and to terminate on January 31st, 1929 at the hour of 3 o'clock A. M., Eastern Standard Time."

While the order of October 12 provided for the issuance of a "limited license", the Commission did not fully define that term until its order of October 24 (R. 111). On October 25 the Commission announced some changes in its previous allocations (R. 181). As late as October 27, WGY was writing the Commission inquiring as to the status of the license proposed to be given it (R. 182-187). The license, when subsequently received, stated that it was for a term beginning November 11, 1928, at 3 o'clock A. M. (R. 188). This was the time when WGY's then existing license for full time operation expired.

The first appeal of the Company was filed on November 9; the second was taken on November 30, to frustrate any contention that the prior appeal was premature. The Court of Appeals held (R. 390):

> "They present the same issues, and while the earlier appeals may have been premature, the last appeal conforms to the rules and is regular."

There is no reason to doubt the correctness of this conclusion.

(2) The submission of additional evidence.

Counsel for WGY, in drafting the statutory "notice in writing of said appeal and of the reasons therefor" stated some matters showing the history of the station, its service to the community and the action of the Commission (R. 2-8, 14-22; 205-282). Copies of all of the exhibits attached to the notice of appeal were on file with the Commission before the appeal was taken.

The Commission filed a lengthy return to the notice of appeal (R. 23-48; 49-52) in which it did not controvert any of the statements in the notice of appeal. The notice of appeal was verified and its statements unchallenged. Under Section 16 the Court had the power to provide for the taking of additional evidence in such manner and upon such terms as it desired. When the matter sought to be laid before the Court was contained in verified affidavits and not controverted, there was no occasion for the Court to order the formal taking of testimony.

Further, as appears from the opinion of the Court, no resort was made by the Court to any matters not contained in the Commission's own "Return" upon the appeal. The facts as to the history of WGY, the investment therein of the General Electric Company, and the unique and meritorious service rendered to over a million listeners in northern New York, Massachusetts, Vermont and New Hamp-

shire are all contained in the Company's application of January 14, which was included in the Commission's return (R. 89-95). The criticism of the Court in this respect is without merit.

(3) The decision denying a renewal of the license was appealable.

The contention of the Commission that its decision of October 12 with reference to the renewal application was not an appealable decision, if sustained, would effectively preclude any questioning of its decisions. On January 14 WGY requested the renewal of its then existing license to operate on Channel 790 kilocycles full time, but the Commission did not grant such renewal, instead issuing a limited license which compelled WGY to cease operations at sunset on the Pacific Coast. To contend that this was not a denial of the renewal but rather was a granting of the renewal is useless sophistry.

(4) The appeal was not moot at the time of the decision.

The Commission's contention that since the licenses to be issued were to be issued on November 11 and were to expire on January 31, there could be no determination after that date of what the Commission should have granted WGY is likewise manifestly unsound. The present case was argued December 3 and 4 (R. 380, 381). The record had not been printed at the time of the argument. The decision of the Court was rendered February 25 and judgment was entered on that day. If, as the Commission contends, the case become moot on January 31, the Commission by issuing licenses for short terms can always preclude a testing of the propriety of its action, because it is virtually impossible to take an appeal, wait the twenty days allowed the Commission to file its return, print the record, prepare briefs, argue the case, and obtain a decision within a shorter time than two or three months.

The Commission's decision not to issue to WGY a renewal of its previously existing license was a fundamental one expressive of a continuing policy to deny WGY the rights to which it was entitled. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U. S. 498, the Interstate Commerce Commission sought to dismiss an appeal from one of its orders as moot upon the ground that the time fixed therein had expired. This Court denied the motion to dismiss saying (p. 515):

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

(5) The appeal by the State of New York.

The Commission's brief discusses rights of the State of New York to appeal from the decision of the Commission. The State of New York conceived that the interest of its citizens was jeopardized by the action of the Commission in failing to renew WGY's license. Voluntarily and unurged by WGY the State of New York filed an appeal from the decision of the Commission and that appeal was docketed. Upon the hearing before the Court of Appeals, the Deputy Attorney General for New York was not allowed to argue, but was permitted to submit a brief, as was the Attorney General of the State of New Hampshire as *amicus curiæ.* This is all there is to the contention seriously argued that the Court of Appeals has misconstrued Section 16 by permitting one not an applicant for a license to appeal. There was no such con-

struction and the extension to the Attorneys General of New York and New Hampshire of the courtesy of filing briefs in support of the interests of the citizens of those states was not error and is immaterial.

(6) No regulation or order of the Commission was held invalid.

There is some attempt on the part of the petitioner to contend that the Court of Appeals held invalid the Commission's Order No. 40 announced August 30, 1925 (R. 100, 102). It did not, of course, do so in express terms. All that the petitioner means by this contention is that the issuance of a license to WGY for full time operation prevents another station, KGO in the fifth zone, from operating on a cleared channel, as contemplated by the Commission's allocation of licenses under General Order No. 40. No reason is suggested by the Commission why such an effect upon General Order No. 40 should be regarded as placing the question of the renewal of the license of WGY beyond the jurisdiction of the Court of Appeals. The preference shown by the Court of Appeals for public interest, convenience and necessity to the preservation of the exact division of cleared channels among the several zones cannot be validly complained of by the Commission. Certainly, the Commission's administrative orders can neither destroy WGY's property rights nor nullify the salutary provisions of the Radio Act allowing appeals. Any disturbance caused by the Court of Appeals' decision in the Commission's general scheme for the allocation of broadcasting licenses under Order No. 40 is due to the Commission's own action in making the allocation in disregard of the priority rights of WGY and its public service. The Court of Appeals properly refused to consider General Order No. 40 as any bar to the relief to which WGY was entitled.

No rule of law required the Court of Appeals to regard General Order No. 40 as sacrosanct. The decision

of the Commission designating only forty of the ninety channels as cleared channels was in disregard of the unanimous recommendation of the engineers advising the Commission, and was in pursuance of a view which Commissioner Caldwell referred to as held by some of his "political-minded associates" (R. 162). If the Commission had seen fit to comply with the recommendation of its engineers and allocated fifty cleared channels, at least ten would have been allocated to the first zone and one would have been available to WGY without depriving any other station in this zone, to which the Commission assigned a cleared channel, of such a channel.

The Commission in making its allocation disregarded entirely the priority rights of WGY, and assumed to exercise arbitrary power to close down WGY in order that some subsequently established station elsewhere in the United States might operate free from interference. The Court of Appeals held that no sufficient reason appeared for imposing this serious restriction upon station WGY, and that a renewal of its previous license should be granted. In response to this direction, the Commission has licensed WGY to operate full time on Channel 790 kilocycles. But, the Commission has not yet licensed WGY to operate as it did before November 11, for it then had the exclusive use of its channel.

The petition and brief (pp. 8-33) suggest that the Commission proposed an arrangement which would have permitted WGY to broadcast until ten o'clock every evening and that the Court of Appeals erred in disregarding it. This proposed "arrangement", not a license, was predicated upon the fact that the station granted full time (night) operation upon Channel 790 kilocycles, KGO, located in Oakland, California, was also owned by General Electric Company.

Commissioner O. H. Caldwell in a letter (R. 31) which he had initialled by his associates proposed that KGO should

shut down from sunset on the Pacific Coast until seven o'clock and that WGY could operate until ten o'clock. This meant that KGO would have had to cease operations during November from 5:01 to 7, Pacific time, during December from 4:56 to 7, during January from 5:17 P. M. to 7, etc. But Commissioner LaFount wrote to the Company on October 2, 1928, referring to Commissioner Caldwell's letter before the decision of October 12, 1928, expressly stating that he had no "power to give away that which belongs to the Fifth Zone" and warning the Company that if the Oakland, California station objected "then my attitude would be entirely different" (R. 123). Subsequently to this proposal and on October 12 the Commission directed the issuance to WGY of the limited license complained of.

The suggestion of the Commission is chiefly significant in showing that the Commission itself considered its General Order No. 40 as subject to modification.

THIRD: The decision of the Court of Appeals reversing the order of the Commission was correct upon the facts.

The record contains the evidence relied upon by the Commission in making its order refusing to renew the license of WGY. This evidence was reviewed by the Court of Appeals and held insufficient to justify the refusal. No other conclusion on the facts was permissible. The character of the station and the service rendered were not questioned. The evidence failed to show that public interest, convenience and necessity would be served by closing down this station during the evening, and, in fact demonstrated the contrary.

The petition for certiorari should be denied.

Respectfully submitted,

FRANK J. HOGAN,
WILLIAM H. DONOVAN,
JOHN W. GUIDER,
Counsel for General Electric Company.

CHARLES E. HUGHES,
STEPHEN H. PHILBIN,
ALLEN S. HUBBARD,
JOHN FLETCHER CASKEY,
Of Counsel.

July 10, 1929.